Supreme Court, U. S.
FILED
NOV 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977
No. 77-569

ZURN ENGINEERS,

Petitioner,

vs.

THE STATE OF CALIFORNIA, acting by and through its DEPARTMENT OF WATER RESOURCES,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal

BRIEF OF RESPONDENT IN OPPOSITION

EVELLE J. YOUNGER,
Attorney General of the State of California,

IVER E. SKJEIE,
Assistant Attorney General,

555 Capitol Mall, Suite 350,
Sacramento, Calif. 95814,
(916) 445-8408,

HENRY G. ULLERICH,
Deputy Attorney General,

800 Tishman Building,
3580 Wilshire Boulevard,
Los Angeles, Calif. 90010,
(213) 736-2266,

Counsel for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Statement of the Case	2
Argument	3
Conclusion	5

TABLE OF AUTHORITIES CITED

Cases	Page
Chapman v. State (1894) 104 Cal. 690, 38 Pac. 457	4
Clack v. State of California (1969) 275 Cal.App. 2d 743, 80 Cal.Rptr. 274	3
D. H. Overmyer Co. v. Frick Co. (1972) 405 U.S. 174	4
Gibson v. Berryhill (1973) 411 U.S. 564	3
Kihlberg v. United States (1878) 97 U.S. 398	4
National Rental v. Szukhent (1964) 375 U.S. 311	4
United States v. Blair (1944) 321 U.S. 730	4
United States v. Callahan Walker Co. (1942) 317 U.S. 56	4
United States v. Carlo Binachi & Co. (1963) 373 U.S. 709	4
United States v. Grace & Sons (1966) 384 U.S. 424	4
United States v. Moorman (1950) 338 U.S. 457	4
United States v. Utah Constr. Co. (1966) 384 U.S. 394	4
United States v. Wunderlich (1951) 342 U.S. 98	4
Ward v. Village of Monroeville (1972) 409 U.S. 57	3

Statutes

California Government Code, Sec. 14378	5
California Government Code, Sec. 14379	5

	Page
California Statutes of 1969, Chap. 1462	5
United States Code, Title 28, Sec. 1257(3)	1
United States Code, Title 42, Sec. 321	3
United States Code, Title 42, Sec. 322	3
United States Constitution, Fourteenth Amendment	2, 3, 4

IN THE

Supreme Court of the United States

October Term, 1977
No. 77-569

ZURN ENGINEERS,

Petitioner,

vs.

THE STATE OF CALIFORNIA, acting by and through its DEPARTMENT OF WATER RESOURCES,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal

BRIEF OF RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Court of Appeal, Second Appellate District, Division Three (Appendix A of Petition) is reported at .... Cal.Rptr. ....; 69 Cal.App.3d 798. The California Supreme Court denied a hearing on July 21, 1977.

Jurisdiction

Petitioner contends that this court's jurisdiction is invoked pursuant to 28 United States Code Section 1257(3).

Respondent contends that no right, privilege, or immunity under the United States Constitution is presented. Rather this case involves a state court's interpretation of a contract.

Statement of the Case

The principal omission in the Statement of the Case is that the California Court of Appeal directed the trial court to enter judgment directing the Engineer of the State to reconsider the claims in the first four causes of action and, of course, make a new decision.

Assuming arguendo, that the claims involve property rights protected under the Fourteenth Amendment, how can it be presumed that the further proceedings would not comport with constitutional requirements? Presumably, if the contractor is not satisfied with the new claim decision, its constitutional arguments can be presented at the time of judicial review of the new decision.

ARGUMENT

This case raises no question warranting review by this court. No title, right, privilege, or immunity under the Constitution is presented.

This case involves the interpretation of a contract between plaintiff and defendant. The agreement utilized a provision for claim decision that provided for finality except for stated reasons. Although federal law was not required to be followed by the contract administrator, the clause provided the same exceptions for finality as set forth in the Wunderlich Act, 42 United States Code Sections 321 and 322. (The clause did not expressly provide "or is not supported by substantial evidence" but the California courts have equated "arbitrary" and "not supported by substantial evidence." *Clack v. State of California* (1969) 275 Cal.App.2d 743 [80 Cal.Rptr. 274].)

The California Court of Appeal opinion does not hold that a contractor making claim for additional money is being deprived of property within the meaning of the Fourteenth Amendment of the United States Constitution. The Court of Appeal found a breach of an implied promise of fair dealing. (Petition Appendix A, pp. 49-50.) The reference to due process means a fairer procedure but is not to be equated with the adversary hearings required where liberty or property is being limited or taken by the entity governing such as the mayor acting as judge. *Ward v. Village of Monroeville* (1972) 409 U.S. 57, or where a state licensing board is adjudicating whether a state license should be revoked. *Gibson v. Berryhill* (1973) 411 U.S. 564. When the entity is contracting, the promises are the issue. Thus, it is submitted that the

California courts are developing a concept of state contract law and the full parameters of the implied promise have not yet been delineated.

The right and power of parties to contract for their own remedies has been consistently reflected in a long line of decisions of this court:

United States v. Utah Constr. Co. (1966) 384 U.S. 394;

United States v. Grace & Sons (1966) 384 U.S. 424;

United States v. Carlo Bianchi & Co. (1963) 373 U.S. 709;

United States v. Wunderlich (1951) 342 U.S. 98;

United States v. Moorman (1950) 338 U.S. 457;

United States v. Blair (1944) 321 U.S. 730;

United States v. Callahan Walker Co. (1942) 317 U.S. 56;

Kihlberg v. United States (1878) 97 U.S. 398.

See also, *D. H. Overmyer Co. v. Frick Co.* (1972) 405 U.S. 174, 185, and *National Rental v. Szukhent* (1964) 375 U.S. 311, 315, 316.

The original contract price was $1,833,131. Petitioner has been paid $2,269,382.05. A contractual claim for additional money does not involve property under the Fourteenth Amendment because the rights and obligations of parties to a contract, even where one party is a state, must be adjusted upon the same principles as if both parties were private persons. *Chapman v. State* (1894) 104 Cal. 690, 694 [38 Pac. 457].

Secondly, remanding for further proceedings does not violate any rights to equal protection.

As to the contention that petitioner will receive a less fair proceeding than small claimants, it should be noted that California Government Code Sections 14378 and 14379 were not enacted by the California Legislature until 1969. (Cal. Stats. 1969, ch. 1462.) These statutes require that certain contracts include certain language. The contract between plaintiff and defendant does not contain that language because the statutes were not in effect in 1964, when the parties entered into the instant contract.

The State of California has not established two classes of contract claimants because when this contract was entered into, the scope and procedure on claims was solely a matter of agreement. The fact that agreements entered into after 1969 must contain statutory provisions involve the rights of post-1969 contractors, not plaintiff.

Conclusion

The respondent submits that a writ of certiorari should not be granted in this cause for the following reasons:

1. There is no federal question involved. The only legal issues are the scope of the implied obligation of fair dealing in contractual claims proceedings.

2. The matter has been remanded for further proceedings and it cannot be presumed that further proceedings will deprive petitioner of rights secured by the United States Constitution.

3. The equal protection of the law's argument is without merit because California Government Code Sections 14378 and 14379 were not enacted at the

time the contract was entered into between plaintiff and defendant and do not pertain to the instant contract.

WHEREFORE, respondent respectfully requests that certiorari be denied.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of the State of California,

IVER E. SKJEIE,
Assistant Attorney General,

HENRY G. ULLERICH,
Deputy Attorney General,

Counsel for Respondent.